IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 64177-8-I
v.	)	UNPUBLISHED OPINION
JUAN ERAS-DUQUE, Appellant.	)	FILED: November 15, 2010

spearman, j. — A jury found Juan Eras-Duque guilty of three counts of robbery in the first degree for the robbery of a store in Issaquah. Eras-Duque appeals his judgment and sentence, contending that the trial court violated his due process rights by admitting evidence of a show-up identification and denying his motion to suppress the identification. We conclude that the trial court did not abuse its discretion in admitting evidence of the show-up identification and denying Eras-Duque's motion to suppress the identification. We also conclude that the arguments Eras-Duque raises in his Statement of Additional Ground are without merit, and affirm.

FACTS

On May 3, 2008, two men entered El Abuelo, a store in Issaquah, catering

to a mostly Hispanic clientele, and went to the soda case. Cashier Maria Armenta and her husband Silvestre Vazquez were sitting at a table watching television. There was no one else inside the store. Suddenly one of the men pulled out a gun and ordered Armenta and Vazquez to lie face-down on the floor. The gunman wore blue jeans and tennis shoes, and the other man wore red boots with white trim. The gunman ordered Armenta to remove money from the cash register, then made her lie down next to Vazquez, who was being watched by the other man. The gunman made Armenta remove the rings from her fingers and struck her with the gun after she said there was no more money. The other man took Armenta's cell phone. Customer Juan Aguilar-Hernandez came into the store and was also ordered to the ground. The robbers ordered him not to look at them, and one of them took money from him. The robbers fled the store.

Sergeant Kevin Nash was informed by dispatch that an armed robbery had occurred at El Abuelo, and arrived within three or four minutes of receiving the dispatch. The robbers were described as two Hispanic males, one wearing a yellow shirt and blue jeans, and the other wearing a brown shirt and red boots. Nash saw two men matching that description approximately three to four blocks north of the store. These men were identified as Juan Eras-Duque and Santos Castillo. Eras-Duque was wearing red cowboy boots and a brown and white shirt, and had highlights in his hair. Nash ordered the men to the ground at gunpoint, and additional officers soon arrived. The officers handcuffed and frisked the

men. They found cash and a cell phone in a bush ten feet away from where Castillo and Eras-Duque were stopped. Castillo had gold rings in his front pocket that were later identified as belonging to Vazquez and Armenta. A day after the robbery, a gun was found under a trashcan nearby. Upon questioning, Castillo admitted to committing the robbery and said the devil made him do it. Eras-Duque denied involvement in the robbery.[1]

Approximately, twenty minutes after the suspects were stopped, a show-up identification was performed. Officers drove Vazquez and Aguilar-Hernandez[2] to where the suspects were lying down side-by-side on the ground.[3] The car drove slowly by Eras-Duque and Castillo twice, while two officers watched over them. Both victims identified Eras-Duque and Castillo as the two men who committed the robbery. Hernandez told officers he recognized the men based in part on their footwear and the highlights that one of them had in his hair. Vazquez recognized the men by their clothing, the red boots, and the hair of the gunman. He was 90 percent sure of his identification.

Castillo pleaded guilty to the robbery but denied Eras-Duque's

[1] Eras-Duque's statements were suppressed by the trial court, because it found that he did not waive his Miranda rights knowingly, intelligently, and voluntarily. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Police read him the rights in English instead of Spanish.

[2] Officer Christian Munoz testified that the cashier, Maria Armenta, was too badly shaken to go to the show-up identification.

[3] The identifying witnesses testified that the two suspects were lying down. The four officers either recollected that the suspects were standing and facing the road during the show-up procedure or could not remember how the suspects were positioned. The court made an oral finding that Eras-Duque and Castillo were lying face-down on the ground during the show-up.

involvement. Eras-Duque was charged with three counts of robbery in the first degree. At trial, none of the three victims could identify Eras-Duque as one of the robbers. Nor could Vazquez or Aguilar-Hernandez identify Eras-Duque at the suppression hearing. Vazquez testified that he got a good look at the robbers because their faces were not covered during the robbery but acknowledged that he was immediately ordered to lie face-down on the floor.

The trial court found that the identification procedure was suggestive but not impermissibly so. The court ruled that even if, for purposes of argument, the procedure was unduly suggestive, the identifications were reasonably reliable. It denied Eras-Duque's CrR 3.6 motion to suppress the identification.

The jury convicted Eras-Duque as charged and he was sentenced to a standard-range term of 51 months.

DISCUSSION

Eras-Duque claims that the trial court violated his due process rights by admitting evidence of the show-up identification and erred in denying the motion to suppress the identification. He also submits a Statement of Additional Grounds[4] pursuant to RAP 10.10, in which he asserts various claims. We affirm.

Show-Up Identification

We review a trial court's denial of a CrR 3.6 motion to suppress "to

[4] He also submits a Supplemental Statement of Additional Grounds, which we will consider because, together with the Statement of Additional Grounds, the two do not exceed the 50-page limit under RAP 10.10(b).

determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." State v. Cole, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal.[5] State v. Balch, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002). Conclusions of law, including mischaracterized "'findings,'" are reviewed de novo. Cole, 122 Wn. App. at 323.

To meet due process requirements, an out-of-court identification must not be "'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'" State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). A two-step inquiry applies. First, the defendant must show that the identification procedure was suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). Second, if the defendant demonstrates the identification is suggestive, the court must determine whether, under the totality of the circumstances, the identification contained sufficient indicia of reliability despite the suggestiveness. Id. In considering whether an identification contains a sufficient indicia of reliability, a trial court must consider the following factors: "'(1) the opportunity of the witness to view the criminal at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the

[5] Here, it appears that the trial court did not enter written findings of fact and conclusions of law. Although failure to enter written findings and conclusions is error, it is harmless if the trial court's oral findings are sufficient to permit appellate review. State v. Riley, 69 Wn. App. 349, 352–53, 848 P.2d 1288 (1993).

criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.'" Kinard, 109 Wn. App. at 434 (quoting State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000)).

Show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). Generally, a show-up identification held shortly after a crime and in the course of a prompt search for a suspect is permissible. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208 (1981), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). A show-up identification is not necessarily suggestive because a suspect is handcuffed and in the proximity of police officers. State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997), overruled on other grounds, State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001).

Eras-Duque claims the identification procedure was impermissibly suggestive because he and Castillo were surrounded by four officers and their patrol cars, forced to lie face-down with their handcuffs visible, and identified by two witnesses who sat together in a patrol car rather than identifying the suspects independently. He also points out that he was lying next to Castillo, the admitted gunman, and that this suggested "'guilt by association.'"

Furthermore, he argues that the identification was not reliable. First, he contends that the witnesses had a limited opportunity to view the robbers because they were ordered face-down on the ground and thus were unable to

observe the robbers at leisure throughout the robbery. Second, he argues that because the witnesses were held at gunpoint during the crime, they suffered from fear and stress, which can affect perception. Finally, he argues that the witnesses' descriptions of the robbers were not consistent or accurate. He points to the fact that Vazquez described the man with boots as the gunman, and to Hernandez's conflicting testimony about the man who took his wallet.

The State contends that the trial court properly reconciled conflicting testimony and determined that even though there may have been some suggestiveness to the procedure, it was not so impermissibly suggestive as to have created an irreparable harm of misidentification. It points out that (1) the two victims indicated a high level of certainty at the time of the identification; (2) there was a short period of time—less than 25 minutes—between the crime and the identification; (3) the victims had a chance to view the robbers during the crime, even though they were ordered to keep their faces down; and (4) they gave details regarding the clothing and physical appearance of each robber.[6] Additionally, the third victim, Maria Armenta, confirmed that the boots recovered from Eras-Duque were the red boots she saw on one of the robbers.

The State cites State v. Guzman-Cuellar, 47 Wn. App. 326, 734 P.2d 966 (1987), where the court determined that a show-up identification conducted at the scene of a shooting less than one hour later was not unnecessarily suggestive

[6] The State also points out that there are no issues respecting cross-racial identification, a factor known to increase the likelihood of misidentification.

even though the defendant was handcuffed and standing 15 feet from a police car. The State points out that Eras-Duque was also handcuffed and near a police car, with the additional circumstance that he was lying on the ground next to his would-be co-defendant.

We agree with the trial court and hold that despite the clearly suggestive nature of the procedure, the witnesses' identification contained sufficient indicia of reliability. The trial court's ruling was based on the considerations that the witnesses got a good look at both suspects, identified the suspects a short time after the robbery, and identified both suspects with a "high level" of certainty. Also, the trial court pointed out that the two identifying witnesses appeared to have maintained their calm throughout the encounter, and did not suffer from the same fear and terror as the other witness, Maria Armenta. These facts support the trial court's ruling, and a review of the record confirms that the findings are supported by substantial evidence in the testimony of the identifying witnesses.

Statement of Additional Grounds (SAG) Issues

Eras-Duque raises a number of issues in his Statement of Additional Grounds. We conclude that none of them has merit.

Speedy Trial

Eras-Duque claims that his right to a speedy trial was violated under CrR 3.3 and the federal and Washington state constitutions. However, his supporting argument is primarily about how defense counsel caused delays in coming to

trial. For instance, he contends that the court on several different occasions, continued the trial "at the behest of mostly the defense for ongoing negotiations." He states that the continuances would have been acceptable had defense counsel performed the tasks associated with representation, but claims that counsel failed to perform these tasks. He also claims that counsel "duped him through the use of an interpreter into believing that he was signing (although blank forms) for his trial to begin." He takes issue with counsel's seeking of a competency evaluation. His speedy trial claim should be considered as an ineffective assistance claim.

Ineffective Assistance of Counsel

In addition to the aforementioned claim that defense counsel's performance delayed his trial, Eras-Duque claims that counsel failed to investigate the identity of a third person he states was involved. SAG 19.

To prevail on a claim of ineffective assistance of counsel, Eras-Duque "must establish both ineffective representation and resulting prejudice." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Prejudice occurs when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. State v. Lord, 117 Wn.2d 829, 883–84, 822 P.2d 177 (1991) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). If a defendant fails to establish either prong, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Eras-Duque's ineffective assistance claim fails because he does not demonstrate that he was prejudiced by any of the alleged deficiencies in defense counsel's performance, and therefore we need not inquire further.

Prosecutorial Misconduct

Eras-Duque contends that the State did not allow defense counsel to perform as constitutionally required, because the defense was not allowed to investigate if it wanted to take advantage of the plea agreement. SAG 15. He also contends that the prosecutor committed misconduct in her closing argument

when she told the jury it was not allowed to hold against him the fact that he was not testifying. He argues that this comment reminded the jury that Eras-Duque did not testify and insinuated that if he was innocent, he would have testified. He argues that the error was not harmless because the jury would not have reached the same result absent the error.

We reject Eras-Duque's claim regarding the plea agreement. Plea negotiations are matters outside the record. Where a claim is brought on direct appeal, "the reviewing court will not consider matters outside the trial record." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We also reject his claim regarding the prosecutor's remark, because it was not improper.

Insufficient Evidence

Eras-Duque contends that there was insufficient evidence to support his conviction. He offers an alternative version of events. He claims that he arrived by car at El Abuelo along with Castillo and Castillo's friend Miguel. He went into the store first, followed by Castillo and Miguel. He claims that Castillo and Miguel decided to rob the store, and that he had nothing to do with the crimes. He claims that he left the store and tried to call 911 but found that the battery of his cell phone was dead. When he saw officers drive by, he tried to flag them down but they failed to stop.

A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All

reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. Id. Here, two of the victims positively identified Eras-Duque and Castillo as the robbers within minutes of the event. Castillo had in his possession rings taken from the victims. Cash and a cell phone were found only feet away from where the men were arrested. Along with the other evidence, this was sufficient to support the jury's verdict.

Open and Public Trial

Finally, Eras-Duque contends that he was denied his right to an open and public trial under article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. He points to three instances when the court requested certain prospective jurors to remain in the courtroom while the remaining prospective jurors were dismissed. He suggests that these were effectively closures of the courtroom.

This claim is without merit. The record reflects that the proceedings in question were held in open court, and there is no evidence that the trial judge sought to remove any members of the public. Rather, the direction to leave the courtroom was given to the remaining members of the jury pool. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (abrogated by State v. Leyerle, No. 37086-7-II, 2010 WL 3860487 (Oct. 5, 2010)) and the other cases cited as authority are inapplicable. Strode involved portions of jury proceedings conducted in the trial judge's chambers. Moreover, a review of the record shows that the instances in

question were appropriate times for the trial court to speak with certain prospective jurors individually to ascertain their fitness as jurors without prejudicing the remainder of the jury panel. It is "well settled that trial courts have discretion in determining how best to conduct voir dire." State v. Davis, 141 Wn.2d 798, 825, 10 P.3d 977 (2000).

Cumulative Error

Eras-Duque contends that cumulative error infected his trial. Because we hold that there was no error individually, we reject this claim.

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Becker, J.